Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for	)	
Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal	)	
Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

FNPRM REPLY COMMENTS OF GVNW CONSULTING, INC.
ICC ISSUES

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EXECUTIVE SUMMARY

We encourage the Commission to use at least the remainder of 2012 as a pause point and carefully assess the impacts stemming from its Transformation Order on the ability of carriers serving the highest cost to serve areas fulfilling the statutory mandate of universal service. We repeat our oft-stated position of the last decade of access reform debate that the transition to bill-and-keep is not an acceptable outcome in light of current federal law and rational economic theory.

The unrecovered embedded costs of investment in rural carrier network facilities are real costs that will continue to be borne by the rural carriers. If carriers are not permitted to recover these costs, such actions would ultimately be deemed confiscatory and subject to review under the Takings Clause. Commission rules as found at 47 C.F.R. Section 65.1-65.830 require that a rural rate-of-return carrier be permitted the opportunity to earn an authorized rate of return on investment allocated to interstate access services.

Establishing a zero rate for originating access creates several public policy consequences, as neither the IXC nor the customer has a good reason to limit its use of the local circuit. The negative consequences of such an approach include the creation of new forms of arbitrage, as the IXCs (or the portion of the acquiring company that uses those assets) are able to use the network for free.

With respect to changes in intercarrier compensation rates, rural carriers must receive recovery of the otherwise displaced interconnection revenue from a sustainable access element that should be available only to carriers that experience such plan-imposed rate reductions. To the extent that changes in the existing rules are undertaken, these rule changes must reflect the legal precedents that limit the obligations of rural carriers to undertake financial responsibility for the transport of traffic beyond their networks.

The provision of telecommunications in the highest cost to serve areas of the country is inherently risky and capital intensive. In evaluating intercarrier compensation cost recovery issues, the Commission should not attempt to ignore its well-established record evidence that rural costs are different. We believe that the Section 251(a) obligation to interconnect directly or indirectly encompasses an obligation to provide transit services. We recommend that the Commission develop rules and regulations related to the provision of transit services under reasonable rates, terms, and conditions.

If the Commission stays on its present course, there will be a need to implement some form of port and link pricing in order to maintain the backbone network that the entire system utilizes.

In order to avoid new forms of arbitrage, we recommend that rural carriers be required to carry traffic to their exchange boundary or existing meet point, consistent with the rural transport rule concept adopted in the Transformation Order. This appropriately provides that rural carriers do not have the financial obligation to deliver their originating traffic to destinations beyond their established network interconnection points.

We respectfully submit that carriers be afforded the flexibility to continue offering service under tariff. Tariffs are an appropriate solution set in situations where it is not feasible for rural carriers to negotiate with numerous service providers who on an individual basis terminate small amounts of traffic.

Introduction and Background

The purpose of these reply comments is to respond to the Further Notice of Proposed Rulemaking of the Federal Communications Commission released on November 18, 2011. For this reply comment date, the Commission seeks comment on issues in Section XVII L-R of the *Further Notice* related to intercarrier compensation issues.

GVNW Consulting, Inc. (GVNW) is a management consulting firm that provides a wide variety of consulting services, including regulatory and advocacy support on issues such as universal service, intercarrier compensation reform, and strategic planning for communications carriers in rural America. We are pleased to have the opportunity to offer reply comments addressing the issues the Commission has raised in its *Further Notice*, as well as offer thoughts that relate to the *Transformation Order (Order*) released by the Commission on November 18, 2011.

Prior pledges from this Commission to avoid flash cuts would seem to indicate that further significant ICC reform should be delayed until 2013 or 2014. As the RAG USF comments filed last month notes in footnote 136: "*No firm can 'turn on a dime' and comply with a new regulation, and the Chairman has been appropriately concerned about 'flash cuts' in reform.*"

We further concur with the Rural Association Group (RAG) at page 32 of its FNPRM USF comment filing: The FCC's current[1] approach "*sacrifices RLEC*

[1] We respectfully submit that a Connect America Fund mechanism will not be successful unless residents in the highest cost to serve areas have the ability to access reasonably comparable broadband services at a reasonably comparable price.

broadband at the altar of imprudent constraints." Considering the extensive absence of methods, rationale, and impact assessment, it is premature for the Commission to conclude that the remainder of access should transition to zero rates. There is not a reasonable path for the Commission to extend that fundamentally flawed methodology to the remaining access components.

If the Commission stays on its present course, there will be a need to implement some form of port[2] and link[3] pricing in order to maintain the backbone network that the entire system utilizes.

M. TRANSITIONING ALL RATE ELEMENTS TO BILL-AND-KEEP

At paragraph 1296 of the *Further Notice*, the Commission requests comment relative to guidance for "*the next steps to comprehensive reform of the intercarrier compensation system.*" As an introduction to this section of our reply comments, we repeat our oft-stated position of the last decade of access reform debate that the transition to bill-and-keep is not an acceptable outcome in light of current federal law and rational economic theory. We further concur with the Regulatory Commission of Alaska that accurately observed that the nation is not uniform in terms of a variety of factors, including geography, climate, length of the construction season, population density and land area.

[2] The "port" portion of this approach would provide access to a transport network. When all services traverse broadband connections, some form of capacity-based pricing will be prerequisite if the Commission intends to comport to the law found in Section 254 and seeks to maintain universal service in all regions of the country.
[3] The "link" would encompass the cable and wire facilities that are required to reach the carrier wire center.

We concur with the Rural Associations' comments at page 3 that states that "*it is essential that the Commission methodically align ICC reform with high-cost USF reform and the core principles of universal service to avoid massive disruption to rural consumers*."

The unrecovered embedded costs of investment in rural carrier network facilities are real costs that will continue to be borne by the rural carriers. If carriers are not permitted to recover these costs, such actions would ultimately be deemed confiscatory[4] and subject to review[5] under the Takings Clause.

Any ultimate Commission decision that would prevent a rural carrier from a compensatory return would violate the carrier's due process under the law and undermine its legitimate, investment-backed expectations. Such interference with carrier property rights in a manner that undermines such expectations constitutes a taking[6]. We concur with the statements found in footnote 13 of the Rural Associations' filing, referencing an October 20, 2011 ex parte letter from Michael R. Romano, NTCA:

A Recovery Mechanism cannot be considered robust or fully compensatory if, for any given carrier, it precludes the recovery of reasonable costs by that carrier. A Recovery Mechanism that ticks downward toward zero and hinders the ability of an individual carrier to make reasonable and prudent new investments in equipment – even IP-enabled soft-switching equipment – may be "predictable," but it is by no means necessarily "sufficient."

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[4] Commission rules as found at 47 C.F.R. Section 65.1-65.830 require that a rural rate-of-return carrier be permitted the opportunity to earn an authorized rate of return on investment allocated to interstate access services.

[5] Established precedent in this regard may be found in Duquesne Light Co. v. Barasch, 488 U.S. 299, 308-10 (1989); and FPC v. Hope Natural Gas Co., 320 U.S. 591,602 (1944). Any changes to access rates that result in revenues that do not recover total costs associated with past investment decisions reviewed by regulators do not comport to the intent of the Telecommunications Act of 1996.

[6] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

With respect to changes in intercarrier compensation rates, rural carriers must receive recovery of the otherwise displaced interconnection revenue from a sustainable access element that should be available only to carriers that experience such plan-imposed rate reductions. To the extent that changes in the existing rules are undertaken, these rule changes must reflect the operational and legal realities that limit the obligations of rural carriers to undertake financial responsibility for the transport of traffic beyond their networks.

<u>Originating Charges remain appropriate given the requirements borne by certain local exchange carriers</u>

At paragraph 1298 of the *Further Notice*, the Commission states that: "*Other than capping interstate originating access rates and bringing dedicated switched access transport to interstate levels, the Order does not fully address the complete transition for originating access charges*."

We concur with the position taken by the Rural Representatives in their March 12, 2012 ex parte presentation at the Commission on this issue. The Rural Representatives noted that "*the Order could not have been [clearer] that there was no intent to reduce originating intrastate access charges in any manner for rural rate-of-return regulated incumbent local exchange carriers (RLECs). Specifically, the Order identified concerns about 'overburdening the Universal Service Fund' as well as a belief that the wholesale toll market would constrain originating rates as justification to avoid capping or otherwise reforming originating intrastate access rates*."

What does this mean for a review of the basis of calculating rural carrier intercarrier compensation? The Commission should follow for rural carrier intercarrier compensation the policy differentiation it used in adopting the Rural Task Force rules for universal service. Simply stated, the prescription to keep communications in rural areas viable[7] is to continue the principles that serve as the foundation of the earlier Rural Task Force rules.

This was the conclusion reached by the Rural Task Force at the start of this century. Rural is still different in 2012, and will still be different in future years. The rural difference is a valid consideration in developing intercarrier compensation public policy in 2012[8]. Any reform to intercarrier compensation for rural carriers must reflect the diversity of cost between rural and non-rural carriers, and among the subset of rural carriers.

This was demonstrated empirically in the Rural Task Force's White Paper 2[9]. In a rate-of-return regulatory environment, the overarching principle that the Commission should adhere to is that rate-of-return carriers are entitled, as a matter of law, to a full recovery of their costs in providing interstate services. A proper balance[10] between the sources of intercarrier compensation, end user rates, and support payments must be maintained.

[7] Rural areas provide benefits to the entire society through the provision of agricultural, energy and recreational resources that are enjoyed by both urban and rural residents.
[8] Rural carriers exist because larger carriers chose not to serve the areas that were most costly to serve.
[9] "The Rural Difference", Rural Task Force White Paper 2, released January 2000.
[10] First and foremost, Section 254 mandates that universal service support be "specific, predictable, and sufficient." Implementing a quantile regression approach to distributing federal universal service funding renders the achievement of the "predictable" tenet impossible. Similarly, the metric of "sufficiency" may well not be achieved. In order for RLECs to continue to deploy rural infrastructure in the highest-cost areas, **reliable access to support funding and intercarrier compensation must continue throughout the investment cycle.**

Transport and Termination

At paragraph 1306 of the *Further Notice*, the question is posed as to the appropriate transition for transport functionality charges. We believe that carriers are entitled to full recovery[11] of those costs. It is not appropriate public policy to ignore costs when action has not been taken to set an appropriate national budget for critical infrastructure. We concur with the Rural Representatives ex parte filing of March 12, 2012 that stated that the Commission "*should therefore allow the 'dust to settle' on ICC (and other) reforms just made (and not even implemented yet) before undertaking additional changes such as reducing the rates applicable to . . . transport services*."

Tandem transiting

We believe that the Section 251(a) obligation to interconnect directly or indirectly encompasses an obligation to provide transit services. All small carriers need tandems[12] for interconnection. In many areas, there are no alternative choices for tandem providers, resulting in a potential abuse of market power by the tandem provider. As industry consolidation continues, the regulation of tandem services will become more important. We concur with the Rural Association filing at page 20, where the Associations state that "*large carriers could attempt to dictate distant points of interconnection that foist transport cost onto smaller carriers' networks. The impacts of these perverse incentives*

[11] The provision of telecommunications in the highest cost to serve areas of the country is inherently risky and capital intensive. In evaluating intercarrier compensation cost recovery issues, the Commission should not attempt to ignore its consistent record evidence of the last decade that rural costs are different.

[12] Alaska carriers are an exception to this statement, as the network architecture in Alaska and the lack of a LATA tandem create a different scenario for carriers in Alaska.

would be compounded by the fact that an IXC may maintain the only long-haul transport route in and out of a rural serving area."

We recommend that the Commission develop rules[13] and regulations related to the provision of transit services[14] under reasonable rates, terms, and conditions.

Several of the current providers of these services are currently well compensated for their infrastructure deployment[15] and should be able to accommodate Commission oversight of transit pricing.

N. BILL-AND-KEEP IMPLEMENTATION

Points of Interconnection and the Network Edge

The dispute surrounding access charges and universal service are fueled by the sheer magnitude of the dollars involved in these types of regulatory decisions, and motivate some carriers to resort to arbitrage (or worse) in lieu of paying for services rendered.

In order to avoid new forms of arbitrage, we recommend that rural carriers be required to carry traffic to their exchange boundary or existing meet point, consistent with the rural transport rule adopted in the Transformation Order. This comports with Section 51.305 (a)(2), wherein the rules provide the ILECs offer interconnection "at any technically feasible point within the incumbent LEC's network." This appropriately

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[13] Current law requires that interconnection must occur at a point with the LEC network. Please see *Iowa Utilities Bd. v. FCC,* 120 F. 3d 753, 813(8th Cir. 1997).
[14] The major current providers include Verizon, AT&T, Sprint Nextel, CenturyLink and Level 3.
[15] As noted at footnote 13 of the Rural Association Group USF filing last month, recent annual reports show that the combined earnings of AT&T and Verizon are approximately twice the level of the entire $4.5 Billion USF. This is not a criticism of large corporations' earnings levels. It simply points out that those companies have actively made choices to place money in assets that yield sufficient and compensatory returns.

provides that rural carriers do not have the financial obligation to deliver their originating traffic to destinations beyond their established network interconnection points[16].

Role of Tariffs and Interconnection Agreements

The *Further Notice* seeks comment on the role of tariffs. We respectfully submit that carriers be afforded the flexibility to continue offering service under tariff. Tariffs are an appropriate solution set in situations where it is not feasible for rural carriers to negotiate with numerous service providers who on an individual basis terminate small amounts of traffic. We concur with Windstream that stated at page 12 of its filing that it would not be in the public interest to force carriers into a costly process when the traffic volumes do not justify such a process.

Respectfully submitted,

Via ECFS at 3/29/12

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[16] We concur with the approach that when competitors elect to locate switching investment well outside the local calling area and utilize indirect connections, rural carriers do not inherit the responsibility for transport to these distant points. We strongly disagree with assertions that would impose build out obligations on rural carriers that would facilitate competitor entry. This is the antithesis of competitive neutrality, which is what should be a foundational element for this Commission.